Supreme Court, U.S.
FILED
FEB 4 1994
OFFICE OF THE CLERK

No. 93-1081

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

LEONARD GILLIS, VALDO A. SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

LAURENCE Z. SHIEKMAN
Counsel of Record
MARC R. GARBER
BRIAN T. ORTELERE
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Attorneys for Respondent
HOECHST CELANESE CORPORATION

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

QUESTION PRESENTED

Whether ERISA requires that a court overturn a plan administrator's application of a severance pay plan's clear exclusion of benefits where a company sold one of its divisions, the employees both were offered and retained their jobs with the purchasing employer and, prior to the sale, the employees were fully informed of the terms of the plan through informal means, but were not provided with a copy of the actual plan document.

LIST OF PARTIES

The parties in the court of appeals were Leonard A. Gillis and Valdo Sargeni, petitioners herein; Hoechst Celanese Corporation, respondent herein; and the Hoechst Celanese Retirement Plan. Messrs. Gillis and Sargeni brought their claims on behalf of a class of former employees of Hoechst Celanese Corporation.

Hoechst Celanese Corporation is a wholly-owned subsidiary of Hoechst Corporation and Hoechst A.G., a German corporation. Hoechst-Roussel Pharmaceuticals Inc. is a subsidiary of the Hoechst Celanese Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991) 7

Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985) 6

Edwards v. State Farm Mut. Auto Ins. Co., 851 F.2d 134 (6th Cir. 1988)..... 7

Gillis v. Hoechst Celanese Corp., 818 F. Supp. 805 (E.D. Pa. 1992) 1, 5, 8

Gillis v. Hoechst Celanese Corp., 4 F.3d 1137 (3d Cir. 1993)..... 1, 5

Kreutzer v. A.O. Smith Corp., 951 F.2d 739 (7th Cir. 1991)..... 7

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 5

Mertens v. Hewitt Assoc., 113 S. Ct. 2063 (1993) .. 4, 5, 6

Simmons v. Diamond Shamrock Corp., 844 F.2d 517 (8th Cir. 1988)..... 7

Veilleux v. Atochem North America, Inc., 929 F.2d 74 (2d Cir. 1991)..... 7

Statutes:

ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).. 4

ERISA Section 502(c)(1), 29 U.S.C. § 1132(c)(1) . 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-1081

LEONARD GILLIS, VALDO A. SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's grant of summary judgment for respondent Hoechst Celanese Corporation ("Hoechst Celanese") on the issues raised in the petition for writ of certiorari is reported at 4 F.3d 1137 (3d Cir. 1993), and is reproduced in the appendix attached to the petition, "Pet. App." at 1a-31a. The district court's opinion, granting Hoechst Corporation summary judgment on that same issue, is reported at 818 F. Supp. 805 (E.D. Pa. 1992), and is reproduced in the petitioners' appendix, Pet. App. at 32a-44a. The court of appeals' order denying the parties' rehearing petitions is not reported, and is reproduced in the petitioners' appendix, Pet. App. at 46a-47a.

STATEMENT OF THE CASE

Petitioners, Leonard Gillis and Valdo A. Sargeni, are former salaried employees of the Delaware City, Delaware, PVC Division of Hoechst Celanese. In September 1989, Hoechst Celanese sold the Delaware City facility, where petitioners worked, to MX Holdings, Inc. and its nominee, American Mirrex Corporation ("American Mirrex"). Pursuant to the sale agreement, petitioners were offered the same jobs with American Mirrex, at the same location and at the same pay.

Hoechst Celanese is the product of a 1987 merger of the American Hoechst Corporation ("American Hoechst") and the Celanese Corporation ("Celanese"). The resulting entity became and remains a wholly-owned subsidiary of a German corporation, Hoechst A.G. Prior to the February 1987 American Hoechst/Celanese merger, petitioners were salaried employees of American Hoechst. In December 1986, petitioners were provided with a copy of the governing American Hoechst severance plan. That plan contained the following exclusion from coverage:

> Employees who are terminated by reason of death, disability, retirement, *sale of all or part of a business (where the acquiring or purchasing company offers continued employment), . . . shall not be considered eligible for separation pay.*

Following the American Hoechst/Celanese merger, Hoechst Celanese adopted a new severance plan, effective January 1, 1989, with almost identical language.[1] Paragraph 2.2 of the Hoechst Celanese Separation Pay Policy for Salaried Employees provides that "all regular, full-time salaried employees who are *terminated by reason of . . . sale of all or part of a business (where the*

---

1. Contrary to petitioners' varied assertions, the record includes the undisputed testimony of Hoechst Celanese personnel authenticating the Hoechst Celanese severance plan in effect as of January 1, 1989.

acquiring or purchasing company offers continued employment) . . . are ineligible for separation pay."

At the time of the sale of the PVC Division, Hoechst Celanese conducted well-attended benefits meetings with its employees to explain, *inter alia,* the general inapplicability of the severance pay plan to employees because the sale of the PVC Division would result in continued employment. Denying petitioners' claims for severance benefits, Hoechst Celanese simply applied the longstanding exclusion clearly provided in the Plan applicable to sales of divisions where the purchaser offers continuing employment.

REASONS FOR DENYING THE PETITION

A.

There are no special or important reasons for granting review of this matter, as required by Rule 10 of this Court's Rules. The gravamen of petitioners' claim is that Hoechst Celanese's failure to distribute formally the severance plan document alone requires an award of severance benefits. ERISA includes a hierarchy of discretionary remedies and to adopt such a *per se* rule would require judicial rewriting of the clear legislative mandate. The lower courts properly considered the remedies possibly occasioned by the lack of formal distribution of a written copy of the plan and the district court has yet to consider whether equitable or other relief may be appropriate.[2]

---

2. While an award of benefits stemming from a mere failure to distribute a plan document might be appropriate in other cases, the record here does not support that result. Since the distribution of the American Hoechst severance plan in 1986, petitioners knew of the governing limitation on severance pay coverage through a variety of informal means. The 1987 American Hoechst/Celanese Merger Agreement, upon which petitioners primarily rely, contains the identical exclusion.

This Court's opinion in *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063 (1993), disposes of the arguments advanced in the petition. Citing ERISA's "comprehensive and reticulated" nature, *Mertens* holds that ERISA does not permit claims for money damages against nonfiduciaries who knowingly participate in a fiduciary's alleged breach. This Court's reluctance to expand ERISA's remedies beyond Congressionally-contemplated boundaries underscores the correctness of the lower courts' refusal to create a *per se* entitlement to benefits and, in turn, provides more than sufficient grounds for denial of the petition.

ERISA Section 502(c)(1), 29 U.S.C. § 1132(c)(1), establishes discretionary remedies for a plan administrator's failure to furnish timely plan documents. Upon a failure to distribute requested plan documents, ERISA permits a court to assess a $100 per day penalty against a plan administrator and if needed, to fashion "other relief as it deems proper." *Id.*[3] The statute does not, however, require an award of benefits for failure to distribute timely a plan document.

Here, the court of appeals affirmed the district court's refusal to fashion the broader remedy petitioners seek while remanding the matter for consideration of

---

3. ERISA section 502(c)(1) is reproduced in the appendix attached hereto, "Res. App." at A-1-2. Although not specifically pleaded in the complaint, the other possible section upon which petitioners could have sought relief is Section 502(a)(3), 29 U.S.C. § 1132(a)(3), which limits the available remedy to an injunction or "other appropriate equitable relief." *Id.* (Res. App. at A-1). Assuming petitioners' claims are also grounded in section 502(a)(3), there is no indication that Congress intended to allow otherwise unavailable compensatory damages in the guise of severance benefits. *Mertens*, 113 S. Ct. at 2069-70 ("Regarding equitable relief in § 502(a)(3) to mean 'all relief available for breach of trust available at common law' would also require us to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between 'equitable' and 'remedial relief' in § 409(a) . . . .").

whether an injunction requiring disclosure is appropriate and, further, whether any monetary sanction is warranted:

> If, on remand, the district court decides [certain standing] issues in plaintiffs' favor, it should then issue an injunction requiring the plan administrator to comply with ERISA's reporting and disclosure requirements. Whether the district court awards plaintiffs any monetary damages is a matter of discretion.

4 F.3d at 1148 (Pet. App. at 22a). To go further, as petitioners request, would interfere with ERISA's "six carefully integrated civil enforcement provisions." *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 146 (1985).[4]

Additionally, and consistent with the discretionary remedial framework in section 502(c), the lower courts considered and rejected petitioners' request that Hoechst Celanese be equitably estopped from denying the benefits, citing a lack of proof that petitioners relied to their detriment on the expectancy of severance. 4 F.3d at 1142 (Pet. App. at 9a-10a).[5] Consistent with

---

4. *See also Mertens,* 113 S. Ct. at 2070 ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute.").

5. As such, petitioners' characterization of the Third Circuit's ruling is inaccurate. According to petitioners:

> The Third Circuit in this case has taken the extreme view that the fact that a benefit policy was not made available to participants is "irrelevant in determining entitlement to benefits."

Petition at 14-15 (quoting *Gillis v. Hoechst Celanese Corp.,* 4 F.3d 1137, 1141 (3d Cir. 1993)). Petitioners overlook the fact that the lower courts analyzed their claims under equitable estoppel principles to determine whether equity required that Hoechst Celanese's failure to distribute the plan estopped it from denying benefits. *Gillis,* 4 F.3d at 1142 (Pet. App. at 9a-10a); *Gillis,* 818 F. Supp. at 810 (Pet. App. at 40a-41a). The possibility of being estopped from denying benefits, along with the $100 per day penalty provision of

Mertens, petitioners' claim to severance benefits has been properly analyzed under the explicit language of the statute.

B.

The other court of appeals' opinions addressing the failure to provide plan documents, on which petitioners rely, simply evidence the varied exercise of discretion authorized in ERISA section 502(c) and elsewhere, rather than a pertinent circuit conflict. In other words, ERISA permits courts to frame appropriate remedies to redress the variety (in type and degree) of possible alleged violations. The remaining opinions cited in the petition address issues not present in this litigation.

For example, in *Blau v. Del Monte Corp.,* 748 F.2d 1348 (9th Cir. 1984), *cert. denied,* 474 U.S. 865 (1985), an employer who "failed to comply with virtually every applicable mandate of ERISA," was not permitted to enforce the terms of a plan document intentionally kept secret from participants. *Id.* at 1353. The procedural violations in *Blau,* according to the Ninth Circuit, altered "the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally." *Id.* at 1354. The factual predicate to *Blau,* including the "wholesale and flagrant" flouting of ERISA, warranted the imposition of a most stringent remedy. *Blau* reflects an example of the exercise of judicial discretion to remedy egregious violations of ERISA's reporting and disclosure requirements and, in fact, is entirely consistent with the Third Circuit's ruling in this case.[6]

NOTES *(Continued)*

§ 502(c)(1), contrary to petitioners' contention, creates ample incentive to distribute plan materials in a timely fashion.

6. The remaining opinions petitioners cite similarly evidence the discretionary nature of the remedies available to courts to redress the myriad sorts of claimed injuries flowing from a failure to disclose a plan. *E.g., Veilleux v. Atochem North America, Inc.,* 929

Decisions such as *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134 (6th Cir. 1988), concerning the problems arising from a variance between a summary plan description and an undisclosed plan, similarly are not relevant to the issues in this litigation. Unlike *Edwards*, every severance document to which these petitioners point contains the very exclusion applied by the Hoechst Celanese plan administrator to deny their claim to benefits. In other words, the record in this case, fully considered by the lower courts, contains no evidence suggesting a possible conflict between disclosures made to participants and the actual plan. As such, the issues addressed in *Edwards* are irrelevant.

Lastly, the fact that court of appeals' opinions recognize the contractual nature of the relationship between a plan sponsor and participants is neither remarkable nor provides a basis for this Court's review. Here, although petitioners did not have the benefit of the written Hoechst Celanese plan document, they knew well its terms. As such, the lower courts' rulings, affirming the denial of severance benefits under ERISA, withstand scrutiny under contract principles as well. Whether analyzed as an implied-in-fact contract or under oral contract doctrines, petitioners have no right to relief.

NOTES *(Continued)*

F.2d 74, 76 (2d Cir. 1991) (per curiam) (where plaintiffs could show "no cognizable prejudice from Pennwalt's failure to comply with ERISA's disclosure requirements," no award of severance required); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743-44 (7th Cir. 1991)(no prejudice to plaintiffs requiring an award of benefits where plaintiffs were told where plan could be found; similarly-situated employees' benefits were calculated pursuant to undisclosed plan; and no evidence of bad faith). *See also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921 (3d Cir. 1990)(where neither evidence of concealment nor discriminatory treatment, failure to produce plan does not warrant a substantive remedy), *cert. denied*, 499 U.S. 920 (1991); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 525 (8th Cir. 1988) (failure to disclose plan cannot support claim to benefits where name plaintiffs knew of plan's existence and plan not applied on discriminatory basis).

C.

The linchpin of petitioners' claim, under contract law or ERISA, is that the Hoechst Celanese severance plan is superseded by a "contract" to be "piece[d] together . . . from evidence of [Hoechst Celanese's] conduct." *See* Petition at 13. Following some thirteen months of discovery, petitioners failed to adduce any evidence from which such an alternative plan (or contract) could reasonably be inferred and, accordingly, the district court granted summary judgment in favor of Hoechst Celanese.

First, the oft-cited American Hoechst/Celanese Merger Agreement contains the identical pertinent exclusion as the Hoechst Celanese severance plan; applied only to former *Celanese* employees; and expired long before the sale of the PVC Division. *Gillis,* 818 F. Supp. at 809 (Pet. App. at 39a). Hoechst Celanese's aspirational "VALUES" brochures contained disclaimers stating that the brochures do not constitute plan documents. *Gillis,* 4 F.3d at 1142 & n.3 (Pet. App. at 9a); *Gillis,* 818 F. Supp. at 808-09 (Pet. App. at 37a-38a). The circumstances arising from the Spartanburg and Greer plants (involving the discharge of workers and a sale by the former Celanese company) could not reasonably form part of a plan or contract requiring benefits for these petitioners. 818 F. Supp. at 809 (Pet. App. at 39a). Documents distributed to Hoechst Canada employees were, in fact, entirely consistent with the Hoechst Celanese plan. *Id.* at 809-10 (Res. App. at 40a). Lastly, no genuine issue of material fact could possibly arise from petitioners' continued reliance on the "grapevine"[7] or, in the parlance of the rules of evidence, rank hearsay. In sum, the lower courts carefully examined, in the summary judgment process, the "evidence" compromising the alleged alternative *de facto* plan (or contract) and found no genuine issue of material fact requiring a trial.

---

7. *See* Petition at 8.

CONCLUSION

Petitioners' claims were properly examined under ERISA and the decisional conflict they describe is, when evaluated against the framework of the statute's remedial provisions, illusory. The petition should be denied.

Respectfully submitted,

LAURENCE Z. SHIEKMAN
Counsel of Record
MARC R. GARBER
BRIAN T. ORTELERE
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Attorneys for Respondent
HOECHST CELANESE
CORPORATION